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IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Congress restricted corporate and union "electioneering communications" about candidates in Title II of the Bipartisan Campaign Reform Act of 2002 ("BCRA") in order to serve a compelling governmental purpose, as required by the First Amendment to the United States Constitution.

2. Whether Congress, in regulating identical speech differently depending upon the medium through which it travels and the speaker that utters it, adequately tailored the definitions of "electioneering communications" in Section 201 of BCRA to serve the anti-corruption purpose proffered in support of those definitions.

3. Whether Congress adopted the least restrictive means of regulating political speech by flatly prohibiting "electioneering communications" by both nonprofit 501(c)(4) corporations and for-profit corporations alike in Section 204 of BCRA, rather than permitting 501(c)(4) corporations to fund such communications exclusively with individual contributions, as was initially contemplated by BCRA.

4. Whether the alternative "fallback" definition of "electioneering communications" in Section 201 of BCRA, as originally worded or as now construed by the district court below to prohibit, without temporal or other qualification, any broadcast communication that "promotes or supports a candidate . . . for office, or attacks of opposes a candidate for . . . office," comports with the First Amendment.

5. Whether Congress violated the Equal Protection guarantee of the Fifth Amendment by granting a special exemption in § 201 of BCRA for political speech by

corporations that own broadcast facilities, as opposed to all other corporations whose identical speech constitutes forbidden "electioneering communications."

PARTIES TO THE PROCEEDINGS

Appellants, plaintiffs in the court below, are the National Rifle Association ("NRA") and the National Rifle Association Political Victory Fund ("PVF"), a Political Action Committee ("PAC") of the NRA.

Appellees, defendants or intervenor-defendants below, are the Federal Election Commission and its Commissioners; the Federal Communications Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

STATEMENT PURSUANT TO RULE 29.6

Neither appellant has a parent corporation, and no publicly held company owns 10% or more of the stock of either appellant.

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INTRODUCTION

Circuit Judge Karen LeCraft Henderson put it well in writing that BCRA "breaks faith with the fundamental principle — understood by our Nation's Founding Generation, inscribed in the First Amendment and repeatedly affirmed by the United States Supreme Court — that 'debate on public issues should be uninhibited, robust and wide open,' " Henderson, J., Mem. Op. 5 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The opinions of her colleagues, however, perversely "leave standing [BCRA's] most pernicious provisions" that strike at the heart of this vital premise. *Id.*

The district court's series of divided opinions somehow find their way to affirming a constitutional right to give and receive unlimited sums of soft money, while denying the right of nonprofit political associations such as the NRA to *speak* on behalf of their individual members -- precisely *inverting* this Court's consistent teachings regarding the greater protections to which independent expenditures are entitled as compared to contributions under the First Amendment.[1] The district court upheld BCRA's ban on the expenditure on political speech of individual $30 contributions that the NRA pools from its members, even as the court affirmed the statute's exemption for the expenditure on political speech of vast corporate resources by massive media conglomerates. And, after striking BCRA's primary definition of "electioneering communications" as overbroad, the district court effectively rewrote the fallback definition such that it now reaches any broadcast reference to any candidate for federal office -- at any time -- "that . . . is *not* neutral as to [the] candidate[ ]." Leon, J., Mem. Op. 92. Offering cold comfort for the resulting "chilling effect," the court has instructed that entities such as the NRA "can avoid regulation simply by not mentioning a candidate for federal

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[1] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44 (1976); *California Medical Ass'n v. FEC*, 453 U.S. 182, 197-99 n.17 (1981); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996).

office" or else "seek[ing] an advisory opinion from the FEC to determine whether a communication is regulated." *Id.* at 95. So, in order to avoid criminal punishment for engaging in political speech, groups like the NRA must now either censor themselves to avoid referencing candidates or else submit the script of their political speech to government bureaucrats for preclearance.

BCRA's regime, both in its original form and as it exists in the wake of the district court's decision, is anathema to the First Amendment and ruinous of political speech in this country. Review by this Court is imperative. Appellants urge the Court to note probable jurisdiction on the questions presented herein, and to reverse the district court on each of these questions.

OPINIONS BELOW

The three-judge district court issued four opinions: a per curiam and an individual opinion by each judge. None of the opinions is reported. *See* Appendix ("App.") 4a. Appellants' notice of appeal is reprinted at App. 1a.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their timely notice of appeal on May 5, 2003. This Court has appellate jurisdiction under Section 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, is reprinted at App. 7a.

The First Amendment to the United States Constitution is reprinted at App. 5a.

The Fifth Amendment to the United States Constitution is reprinted at App. 6a.

STATEMENT OF THE CASE

1. Title II of BCRA criminalizes the funding of any "electioneering communication" from corporate or union general treasury funds.[2] *See* Section 203 (prohibiting corporate and union "electioneering communications"); Section 312 (authorizing imprisonment of up to five years for a violation). Under Title II's primary definition of "electioneering communications," corporations and unions cannot fund

> any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within . . . 60 days before a general, special, or runoff election for the office sought by the candidate[,] or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

See Section 201(revising 2 U.S.C. § 434(f)). Congress also included a back-up definition of "electioneering communication," however, to take effect if its primary definition is struck down as "constitutionally insufficient." *Id.* According to the fallback definition, "electioneering communication" means "any broadcast, cable, or satellite

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[2] In addition, BCRA imposes disclosure obligations upon persons who fund "electioneering communications." *See* Section 201.

communication which promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Id.* Thus, in contrast to the primary definition's approach, the fallback definition specifies no temporal or targeting limitations on its scope, but limits its prohibition to speech that has "no plausible meaning" apart from electioneering.

Both definitions of "electioneering communication" include a special media exemption. They do not reach "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate." *Id.* Accordingly, corporations that own "the facilities of any broadcasting station" remain free to carry electioneering communications in the form of news stories, commentaries, or editorials. *See* Henderson, J., Mem. Op. 222.

Title II of BCRA contains a provision (Section 203, the so-called "Snowe-Jeffords provision") exempting the "electioneering communications" of 501(c)(4) corporations to the extent they are funded from a segregated fund to which only individuals may contribute. Anomalously, another provision of Title II (Section 204, the so-called "Wellstone Amendment") entirely negates this exemption. The district court's per curiam opinion explains how the relevant provisions interact to achieve this result:

> The Snowe-Jeffords Provision [in Section 203] permits nonprofit organizations to use their general treasury funds to pay for electioneering communications if they are incorporated under

Section 501(c)(4) and/or Section 527(e)(1) of the Internal Revenue Code . . . .

While a nonprofit corporation under Snowe-Jeffords is permitted to use general treasury funds for electioneering communications, . . . these corporations are not permitted to use funds donated by a corporation, labor union, or national bank to purchase them. Under Snowe-Jeffords, a nonprofit corporation may only use funds donated by individuals to pay for electioneering communications. If a nonprofit corporation, for example, has accepted corporate contributions and mixed those contributions with general treasury funds that contained individual donations, the nonprofit corporation would not be permitted to use their [sic] general treasury funds to engage in electioneering communications.

. . . .

Despite drafting and including the Snowe-Jeffords provision in the Act, an amendment offered by Senator Paul Wellstone and adopted by the Senate effectively eviscerates the Snowe-Jeffords Provision from the Act . . . . The direct consequence of the Wellstone Amendment is that organizations organized under Section 501(c)(4) and Section 527(e)(1) of the Internal Revenue Code, or those entities who have received funds from corporations, are not permitted to use their general treasury funds for electioneering communications.

The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of Section 501(c)(4) organizations and Section 527

> within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored. *See* BCRA Section 401 (discussing that BCRA is subject to severability).

Per Curiam Op. 67-70.[3] The NRA is one such 501(c)(4) corporation that, under Snowe-Jeffords, could have pooled donations from millions of individual members into a powerful, collective voice expressing their shared political message, but whose "electioneering communications" will now be silenced, on pain of imprisonment, by the Wellstone Amendment as upheld by the district court.

2. The National Rifle Association "is a tax-exempt corporation governed by 501(c)(4) of the Internal Revenue Code and incorporated in the State of New York." Per Curiam Op. 85, ¶ 13. Its four million members are individual Americans bound together by a common desire to advance its defining mission: the preservation of the Second Amendment right to "keep and bear arms." *Id.*; *see* Henderson, J., Mem. Op. 67, ¶ 2. Most of these members "are individuals of modest means," Henderson, J., Mem. Op. 110-11, ¶ 51(f)-(g); "the average NRA donor donates approximately $30 per year." Per Curiam Op. 96, ¶ 41. The NRA uses these donations to represent the views of its membership "on legislative and public policy issues before federal, state and local officials and

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[3] *See also* Henderson, J., Mem. Op. 37 ("section 204 — referred to by the parties as the "Wellstone Amendment — eliminates the section 203(b) exception"); Kollar-Kotelly, J., Mem. Op. 455 ("With the Snowe-Jeffords' provision, BCRA appeared to provide for an exception to the electioneering communication ban for certain types of corporations; however, this exception has been eliminated by the 'Wellstone Amendment.' "); Leon, J., Mem. Op. 97 ("What Section 203 provides, however, Section 204 takes away.").

the general public." Per Curiam Op. 85, ¶ 13; Henderson, J., Mem. Op. 67, ¶ 2. In addition, the NRA sponsors activities, such as firearm-safety training and shooting competitions, that promote the enjoyment of the very Second Amendment freedoms it seeks to preserve. *See* Per Curiam Op. 85, ¶ 13.

The NRA Political Victory Fund (the "PVF") is a political committee within the meaning of 2 U.S.C. § 431(4) and is a separate segregated fund of the NRA. *Id.* at 85, ¶ 14; Henderson, J., Mem. Op. 67, ¶ 3.

The NRA, in the course of defending the constitutional rights of its members, constantly engages in political speech on issues of vital importance to its mission. It does so as part of a robust, ongoing, and consistently heated debate that roils in this country over the meaning of the Second Amendment and the protections to which gun owners are constitutionally entitled. The NRA's frequent references to candidates for federal office are an integral part of its contribution to this debate; wholly apart from influencing elections, these references enable it to respond to pointed attacks that candidates themselves frequently direct against it, to educate the general public about the Second Amendment and those who would threaten it, and to raise funds from Americans who are favorably disposed to its cause. *See* Henderson, J., Mem. Op. 107-10, ¶ 51; Kollar-Kotelly, J., Mem. Op. 324 & nn.103-04.

In defense of its First Amendment rights to engage in such political speech, the NRA initiated this action on March 27, 2002 -- the very morning on which BCRA was signed into law -- seeking to enjoin Title II's criminalization of "electioneering communications." In light of the diverging, and indeed conflicting, interests of the plaintiffs challenging Title II, the NRA subsequently agreed to consolidation of its challenge with those of its fellow plaintiffs only upon receiving an explicit

assurance from the district court that it would be permitted to file its own brief and to present oral argument.

3. Although distilling the three-judge district court's holdings from its four separate opinions is not easy, the court's holding with respect to the constitutionality of Title II's definition of electioneering communication is controlled largely by the memorandum opinion of Judge Leon: Judge Leon joins Judge Henderson in striking the primary definition of "electioneering communication" because of its overbreadth; he then upholds the fallback definition, joined by Judge Kollar-Kotelly, adopting a saving construction striking the 'final clause" that would otherwise render it "unconstitutionally vague." Leon, J., Mem. Op. 93.

The district court's per curiam opinion, which Judge Henderson does not join, *see* Per Curiam 4 n.1, does not treat with Congress' definition and prohibition of "electioneering communications" in Title II of BCRA.[4] It does, however, make

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[4] The Court's per curiam opinion is written by Judges Kollar-Kotelly and Leon and, besides summarizing the Court's overall holding and offering some background discussion, speaks only to discrete aspects of this case. *See* Per Curiam 5. After offering, in Part I, a helpful summary of the Court's ultimate holdings with respect to the various provisions of BCRA that are at issue, *see id.* at 5-15, Part II of the opinion: (a) "canvass[es] the history of campaign finance regulation," *id.* at 15-42; (b) traces the legislative history of BCRA, *see id.* at 42-50; (c) describe the procedural history of this litigation, *see id.* at 50-57; and (d) outlines various provisions of Titles I through V of BCRA. *See id.* at 57-80. Thereafter, Part III of the opinion offers findings of fact that describe "the identities of the parties" and generally relate to BCRA's disclosure provisions. *Id.* at 80-106, ¶¶ 1-52. Part IV of the opinion contains its conclusions of law, which (a) address and reject the Paul plaintiffs' unique arguments that BCRA violates freedom of the press, *see id.* at 106-13; and then (b) address plaintiffs' collective arguments that various disclosure and coordination provisions of BCRA are unconstitutional, upholding all of the provisions against challenge -- or rejecting challenges to them as nonjusticiable -- except for the requirement of Section 201 that a contract for an "electioneering communication" be

plain the deep fissures that weave throughout the "separate opinions by the members of this three-judge panel" such that "not any one opinion is fully dispositive." *Id.* at 171. Indeed, all four opinions present hundreds of pages of separate though often repetitive findings of fact. *See* Leon, J., Mem. Op. 65, 115 ("Despite our best efforts to produce a complete set of Findings of Fact, in which two or more members of this Court concur, we were unable to do so.").[5]

Judge Henderson would have struck Congress' attempt to regulate "electioneering communications" under Title II on numerous, independent grounds. First, Judge Henderson concluded that Congress' restriction of "electioneering communications," under either of Section 201's definitions, would unconstitutionally reach beyond this Court's definition of express advocacy in *Buckley v. Valeo*, 424 U.S. 1 (1976). Henderson, J., Mem. Op. 204-19. Second, Judge Henderson held in the alternative that Congress' ban on "electioneering

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disclosed before it is run. *See id.* at 113-70. The opinion concludes with a short Part V, explaining that the three memorandum opinions of the respective judges are arranged "in order of seniority" and clarifying "that not any one opinion is fully dispositive." *Id.* at 170-71.

[5] *See also* Henderson, J., Mem. Op. 65 n.55 ("To be clear, I do not join the *per curiam* statement of facts, nor do I join the factual findings set forth in the other opinions."); Kollar-Kotelly, J., Mem. Op. 16 ("though . . . I am in dissent on most of Title I, as well as in dissent with regard to the primary definition of electioneering communication in Title II, I have found it appropriate to adequately set forth the bases of my Factual Findings to assist the appellate review of the three-judge District Court's decisions"); Leon, J., Mem. Op. 115-16 ("I believe it is necessary to set out, for the most part, those facts which in my judgment are sufficiently relevant and probative to rely upon in reaching my conclusions. Accordingly, while there may be other relevant and probative facts in the record, I do not accord them sufficient weight to warrant either relying on them in my judgments, or including them in my Findings.").

communications" in Section 203 could not survive the strict scrutiny required by the First Amendment because it does not " 'alleviate the [alleged] harms *in a direct and material way*' ";[6] in failing to regulate identical electioneering content carried by newspapers, direct mail, the Internet, or even that broadcast by media corporations, the statute's "underbreadth 'diminish[es] the credibility of the government's rationale for restricting speech in the first place.' " [7] *See id.* at 219-23. Finally, Judge Henderson explained that, even if Title II "served the government's interest in preventing . . . actual or apparent corruption,"[8] it is not narrowly tailored to do so: It both sweeps in the wrong speech, regulating ads designed to influence legislative outcomes as well as electoral ones, and the wrong speakers, forbidding (via the Wellstone Amendment in Section 204) nonprofit voluntary political associations "from the ACLU to the NRA to MCFL itself" from funding electioneering contributions, notwithstanding their use of individual as opposed to corporate contributions.[9] *See id.* at 224-27.

Judge Kollar-Kotelly, in contrast, would have upheld virtually all of Title II,[10] including its primary definition of "electioneering communications." Applying strict scrutiny,

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[6] *Id.* at 220 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 662, 664 (1994)).

[7] *Id.* at 223 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)).

[8] *Id.* at 224.

[9] *Id.* at 226

[10] The exceptions are the prior disclosure requirement of Section 201, which Judges Kollar-Kotelly and Leon struck down in the per curiam opinion, *see* Per Curiam 121-24, and Section 213, forcing political parties to choose between making either coordinated expenditures or unlimited independent expenditures on behalf of candidates. *See* Kollar-Kotelly, J., Mem. Op. 744; Leon, J., Mem. Op. 99-106.

Judge Kollar-Kotelly found this the "rare" case in "which a content-based restriction on speech" should be upheld. Kollar-Kotelly, J., Mem. Op. 475. Specifically, she concluded (1) that the record demonstrated a compelling interest in combating both corruption and the appearance of corruption associated with "sham" issue ads funded by corporations and unions; (2) that *Buckley* did not limit Congress to regulating only express advocacy; and (3) that Title II's regulation of particular speech, media, and speakers was narrowly tailored to serve its purpose. *See id.* at 356-476. Judge Kollar-Kotelly nonetheless acknowledged that her upholding of BCRA's primary definition of "electioneering communication" departed from "the majority who have found the primary definition unconstitutional." *Id.* at 357. And despite repeatedly voicing concerns about the inherent subjectivity of determining whether particular issue ads are "genuine" as opposed to "sham,"[11] Judge Kollar-Kotelly joined Judge Leon in upholding the fallback definition of "electioneering communications," *see id.* at 357, 476, which turns entirely upon whether a particular ad is understood to "promote[ ] or support[ ] . . . or attack[ ] or oppose[ ]" a candidate.[12]

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[11] *See, e.g., id.* at 431 ("By constructing [the primary definition's] bright-line test, and avoiding a test that rests on subjectivity, Congress . . . avoided the vagueness problems that plagued FECA"); *id.* at 443 ("[T]he problem with this approach is that it asks the Court to sit as the viewer and find that these advertisements were pure issue advertisements. The *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of the political message."); *id.* at 446-47 ("The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering communication.").

[12] *See* Section 201; Leon, J., Mem. Op. 92-93, 80 ("the backup definition . . . depend[s] on the effect of the communication's message on a candidate's election").

Judge Leon cast the decisive vote in both striking down Title II's primary definition of "electioneering communications" and upholding its fallback definition. In Judge Leon's view, the primary definition is unconstitutionally overbroad because "the periods preceding elections are the most effective times to run issue advertisements discussing pending legislation,"[13] and "there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular piece of pending legislation."[14] The primary definition would ban issue and electioneering ads alike and therefore was unconstitutional on its face: "[T]he realistic danger that the primary definition of electioneering communications will significantly compromise genuine issue advocacy necessitates such a finding."[15] *See id.* at 74-86.

Judge Leon had no such problem with the fallback definition, however. And although he concluded "that the backup definition's final clause, which requires the message to be 'suggestive of no plausible meaning other than an exhortation to vote,' is unconstitutionally vague,"[16] Judge Leon thought the definition susceptible to a saving construction simply deleting its final clause. *See id.* at 90-95. Under the modified definition, "one need only conclude, in effect, that [an] ad is *not* neutral as to both candidates for it to have satisfied the backup definition, and [it] thereby . . . satisfie[s] the objective First Amendment standard that a reasonable person considering the context and nature of the expression at

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[13] Leon, J., Mem. Op. 76.

[14] *Id.* at 77.

[15] *Id.* at 86.

[16] *Id.* at 93.

issue is able to evaluate the speech."[17] According to Judge Leon, any would-be speaker who might be chilled by doubts about the "neutrality" of a particular reference to a candidate could "avoid regulation simply by not mentioning a candidate for federal office in its ad" or seek "an advisory opinion from the FEC" prior to running it.[18]

With respect to the purpose and tailoring of Title II's regulation of "electioneering communications," Judge Leon ultimately concluded that they satisfy strict scrutiny. He therefore upheld the ban on "electioneering communications" (as defined in the modified fallback definition) funded from corporate and union treasury funds. *Id.* at 87-90, 96-98.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

> "[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."

New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803), 297 (editor's appendix)) (Black, J., joined by Douglas, J., concurring). If there is truth in this proposition, then Title II of BCRA cannot stand, for it restrains, on pain of criminal sanction, the airing of broadcast ads "speaking, writing, or publishing . . . opinions . . . upon the conduct of those who may advise or execute" public measures.

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[17] *Id.* at 92.

[18] *Id.* at 95.

It is, after all, "*electioneering communications*" that BCRA in terms restricts the NRA and similar issue advocacy organizations from broadcasting during an election campaign.

The speech-suppressing purpose of Title II of BCRA is plain from the face and operation of the statute itself. And its true purpose was candidly proclaimed, by those who urged BCRA's passage in Congress: "[Title II] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airways." 148 CONG. REC. S2096, S2117 (daily ed. Mar. 20, 2002)(statement of Sen. Cantwell). *That* is Title II's true purpose, and that, accordingly, is its epitaph.

I. TITLE II'S OPERATION AND LEGISLATIVE RECORD REVEAL ITS SPEECH-SUPPRESSING PURPOSE.

Title II restricts speech based upon its content. Appellees therefore concede that they must prove that the measure advances a compelling governmental purpose in the least restrictive manner. Opening Government Brief at 133-34. Appellees also assert that Title II's "compelling governmental purpose" was the same one relied upon by the State of Michigan in *Austin* -- "to ensure that [political] spending 'reflect[s] actual support for the political ideas espoused by corporations' and unions, rather than their success in the economic marketplace." Government Brief in Opposition at 55 (quoting *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990)). But this is belied both by Title II's operation and by the legislative record.

Targeted by its terms specifically at broadcast ads referring to a federal candidate during an election campaign, Title II's speech-suppressing purpose is plain on its face: to suppress to the maximum possible extent the specific political speech by "outside interest groups" -- "negative attack ads" --

that BCRA's proponents openly and uniformly decried. The sponsors of Title II were candid about their goal of suppressing such "negative attacks ads" and "sham issue ads," both in the legislative record and in their sworn depositions in this case. *See, e.g.*, 145 CONG. REC. S12,575, S12,606-07 (daily ed. Oct. 14, 1999) (statement of Sen. Wellstone) ("I think these issue advocacy ads are a nightmare. I think all of us should hate them. . . . We could get some of this poison politics off television."); 148 CONG. REC. at S2117 (statement of Sen. Cantwell) ("[Title II] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."); 147 CONG. REC. S3084, S3115-16 (daily ed. Mar. 21, 2001)(statement of Sen. McCain) (Issue ads have "demeaned and degraded all of us because people don't think very much of you when they see the kinds of attack ads that are broadcast on a routine basis."). If "strict scrutiny" means anything, it surely must mean that the "compelling governmental interest" necessary to justify a content-based speech restriction must be the purpose that *actually* motivated Congress when it passed the law in question. *See, e.g., Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002).

Far from preventing *Austin*-type corruption, BCRA perversely ensures that the power of the NRA's political voice will be *artificially deflated* vastly below its "contributors' support for the corporation's political views." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660-61 (1990). Title II channels the NRA's "electioneering communications" through its PAC, the PVF, which receives a pittance compared to the NRA's revenue from individual contributions, for few NRA members can afford to pay twice -- first, to satisfy the NRA's membership fee and, second, to donate specifically to PVF -- as would be required for their dollars actually to flow to PVF. 11 C.F.R. § 114.7; 11 C.F.R.

§ 114.1. *See* Henderson, J., Mem. Op. 110, ¶ 51.g.1. This congressional attempt at speech suppression for its own sake is antithetical to the First Amendment.

II. THE GOVERNMENT HAS FAILED TO PROVE THAT THERE IS NO LESS RESTRICTIVE ALTERNATIVE TO TITLE II.

Even if the Government could establish that preventing *Austin*-type corruption truly was Congress's purpose in stifling the "electioneering communications" of grassroots issue advocacy groups like the NRA, Title II would nevertheless have to be struck down. The First Amendment "imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective," *Reno v. ACLU*, 521 U.S. 844, 879 (1997), and here appellees are at a complete loss.

In its original form, as proposed by Senators Snowe and Jeffords, Title II of BCRA allowed 501(c)(4) nonprofit organizations and 527 "political organizations" to spend general treasury funds for electioneering communications so long as those funds were derived from contributions by individuals rather than corporations. *See* Section 203(b) ("the Snowe-Jeffords provision"). But Senator Wellstone's amendment to Title II added Section 204 ("the Wellstone Amendment"), which "effectively eviscerates" the Snowe-Jeffords exception. Per Curiam Op. 69.

This Court need look no further than the original Snowe-Jeffords provision for a less restrictive alternative to Title II for ensuring that business profits do not spill over into the political marketplace. That provision is a complete answer to the problem identified in *Austin* and supposedly addressed by Title II: that corporations distort the political process when they speak with the support of "market profits," Intervenors' Brief in Opp. at I-57, which "have little or no correlation to the

public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660-61. Plainly, individual contributions to a grassroots issue-advocacy organization from its members closely "correlate" with the public's support for its views.

The acknowledged purpose of the Wellstone Amendment further demonstrates its invalidity. Appellees maintained below that the amendment aims to "prevent large soft-money donations from individuals . . . from being passed through nonprofit corporations to purchase electioneering ads." Government Reply Brief at 58. Of course, this rationale has nothing to do with *Austin*-style corruption, the only governmental interest that has ever been found by this Court sufficiently compelling to stifle political speech.

As noted above, the Wellstone Amendment took the unusual form of a separate section nullifying but not deleting the Snowe-Jeffords provisions precisely so that it could be severed without dooming the rest of Title II. The principal sponsors of Title II were openly concerned that the Wellstone Amendment would be held unconstitutional, and they insisted on coupling it with an express severability provision.[19] If the Wellstone Amendment is enjoined, therefore, grassroots political advocacy organizations like the NRA will have regained their right to participate in the Nation's political discourse, while other major sponsors of issue ads, such as the Chamber of Commerce (a 501(c)(6) organization) and the

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[19] *See, e.g.*, 147 CONG. REC. S3070, S3073 (daily ed. Mar. 29, 2001) (statement of Sen. Feingold) ("I thought and still think that [the Wellstone Amendment] makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill voted for it. In any event, the Wellstone Amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone Amendment is held to be unconstitutional.").

AFL-CIO, will still remain subject to Title II's restrictions. Notably, the NRA was the sole plaintiff in the court below to challenge the Wellstone Amendment on the grounds set forth above. Only Judge Henderson recognized this inconsistency between the Wellstone Amendment and the requirement of narrow tailoring. *See* Henderson, J., Mem. Op. 225-27.

III. BCRA IS AN ARBITRARY PENAL CODE FOR POLITICAL SPEECH THAT IS BOTH OVERBROAD AND UNDERINCLUSIVE.

To sustain BCRA's ban on "electioneering communications," the Government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotations and citations omitted). BCRA's alleged statutory "purpose is belied . . . by the provisions of the statute, which are both underinclusive and overinclusive." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978). Title II's patchwork of confusing and contradictory restrictions constitutes an arbitrary speech code that is not narrowly tailored to advance a legitimate, let alone a compelling, governmental purpose.

A. BCRA Is Fatally Overbroad.

BCRA's prohibition on electioneering communications is fatally overbroad both because it silences *speakers* that pose no threat of the harms allegedly sought to be prevented and because it criminalizes *categories of speech* that are wholly divorced from the statute's purposes. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255

(2002). *Ashcroft* struck down the Child Pornography Prevention Act as overbroad on the basis of *hypothesized* applications of the law. *See id.* at 259; *id.* at 273 (Rehnquist, C.J., dissenting). Here, by contrast, there is *compelling evidence* that the NRA and other nonprofit advocacy organizations engage in conduct that does not implicate the statute's purpose, and in speech that falls outside the ambit of the restriction's purported rationale.

1. BCRA Criminalizes the Speech of Organizations That Pose No Threat of Corrupting The Political Process.

This Court has repeatedly held that core political speech is protected by the First Amendment even when corporations are the speakers. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 45, 50, 187 (1976); *Bellotti*, 435 U.S. at 777; *Federal Election Comm'n v. MCFL*, 479 U.S. 238, 259 (1986). Indeed, in *Massachusetts Citizens for Life*, the Court upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. Only once — in *Austin* -- has this Court upheld an independent expenditure restriction on core political speech. And, the specific danger identified in *Austin* -- corruption of the political process through the aggregation of wealth generated by business corporations -- has no application to nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members. Title II of BCRA must therefore be struck down.

In *MCFL*, 479 U.S. 238 (1986), this Court held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form:

> The resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas. . . .
>
> . . . .
>
> . . . Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed *to disseminate political ideas, not amass capital.* The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

479 U.S. at 258-59 (emphasis added). The *Austin* Court, in contrast, upheld a state law restricting expenditures on express advocacy by the Michigan Chamber of Commerce because 75 percent of the Chamber's funding came from for-profit corporate members and, thus, "resources amassed in the economic marketplace" could have been used by the Chamber "to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The "corrosive and distorting effects" of the Chamber's corporate wealth had "*little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

MCFL and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and contributions, and business or trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of *corrupting* the political process through wealth generated in the economic marketplace.

The NRA is the archetypal issue advocacy group protected by the First Amendment. Like MCFL, it "was formed to disseminate political ideas, not amass capital," District Court NRA Appendix ("NRA App.") 106, and its members are "fully

aware of its political purposes." *See* NRA App. 133-56. Thus, the NRA's resources plainly "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." 479 U.S. at 259.[20] The organization serves as a vehicle through which "large numbers of individuals of modest means can join together . . . to '[amplify] the voice of their adherents.' " *Federal Election Comm'n v. NCPAC*, 470 U.S. 480, 494 (1985) (quoting *Buckley*, 424 U.S. at 22) (alteration in original).

> To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

NCPAC, 470 U.S. at 495. And the aggregated wealth that the NRA receives in $30 contributions from its members corresponds with its members' support for its political ideas. If the NRA's voice is loud and reverberates through the halls of Congress, it is precisely because the organization is the *collective voice* of millions of Americans speaking in unison. That "is not a *corruption* of the democratic political process; it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 319 (1991) (Marshall, J., dissenting).

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[20] The NRA derives *de minimis income* from business corporations. Although the NRA derives substantial *revenue* from advertising in its magazines and the sale of NRA memorabilia, it *loses* money on these activities. Additionally, the NRA generates about $1.7 million a year in rental income from leasing its building space. Finally, the NRA receives minimal contributions from for-profit businesses.

2. BCRA Criminalizes Speech That Is Not Intended To Influence Elections.

BCRA's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections.

The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal purposes: (a) to educate the public about Second Amendment and related firearm issues, including pending legislative initiatives; (b) to defend itself against attacks aired by the broadcast media, including attacks by politicians opposed to the NRA's views on the Second Amendment and related issues; and (c) to recruit members and raise funds. When engaging in such speech, the NRA often makes references to public officials and candidates for federal office. The vast majority of this speech is not intended to influence elections, and BCRA's criminalization of this speech demonstrates the statute's dramatic overbreadth.

B. BCRA Is Fatally Underinclusive.

The dramatic overbreadth of Title II's ban on "electioneering communications" is matched in degree by its glaring underinclusiveness. Congress has drawn haphazard lines and indulged arbitrary distinctions that prohibit electoral speech "only at certain times and in certain forms," *Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002), and that "depend upon the identity of its source." *Bellotti*, 435 U.S. at 777. "It would naively underestimate the ingenuity and resourcefulness of . . . groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted th[is] restriction . . . but nevertheless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45.

The palpable underinclusiveness of BCRA's speech regulations fatally " 'diminish[es] the credibility of the government's rationale for restricting speech in the first place.' " Henderson, J., Mem. Op. 223 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)).

Specifically, corporations can engage in unlimited print advertising, direct mail, and internet broadcasts, even if such communications are squarely intended to influence a federal election. Additionally, under BCRA, wealthy individuals and unincorporated groups remain free to spend unlimited sums on ads designed to influence federal elections.

Even more egregiously, Congress has specifically exempted from its ban any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station." Section 201(a). This means that General Electric through its NBC subsidiary or Microsoft through its ownership of MSNBC can broadcast the very same "electioneering communications" that Congress has forbidden the NRA and other nonprofits from sponsoring. The media exception thus stands for the perverse proposition that it is wrong to use corporate money to pay for a discrete amount of broadcast time to air electioneering communications, *unless* the amount of money used is so enormously large that it purchases *an entire station's worth* of broadcast time.

IV. TITLE II'S EXEMPTION FOR MEDIA CORPORATIONS VIOLATES EQUAL PROTECTION.

Again, Title II's ban on "electioneering communications" does not extend to any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." During the period when all other corporations are muzzled, media companies may air as many of *their own* electioneering programs as they wish. Unlike other

corporations, they can endorse candidates for election and name candidates while editorializing on particular issues. But Title II's media exception does more than give the broadcast companies a special license to discuss candidates for federal office. By banning advocacy groups from buying their own advertising time, Title II puts those broadcasters in the position of being able to grant (or deny) speech licenses to advocacy groups whose only remaining hope for air time is to be chosen by a broadcaster for inclusion on one of its programs.

This is unconstitutional. This Court has rejected the proposition that "communication by corporate members of the institutional press is entitled to greater protection than the same communication by [non-media companies]." *Belotti*, 435 U.S. at 782 n.18. The Constitution's equal protection guarantee prohibits the Government from discriminating between classes of speakers without a compelling governmental purpose. *See Austin*, 494 U.S. at 667. In *Austin*, the Court identified a purpose sufficient to survive this strict scrutiny. The "unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate,' " provided Michigan with a compelling interest for exempting the media from a prohibition against corporate political expenditures that "conceivably could be interpreted to encompass election-related news stories and editorials." 494 U.S. at 667-68 (citation omitted). "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." *Id.* at 667.

Austin cannot save BCRA's media exception because its factual predicates -- the assumptions that media corporations (1) occupy a "unique societal role" in disseminating information and (2) devote their resources to the news business -- are no longer true. Henderson, J., Mem. Op. 124-27, ¶ 54. The emergence of the internet and the absorption of the

broadcast networks by non-media conglomerates have profoundly altered the nature of the traditional media companies and the role that they play. Thus, BCRA's media exemption violates the equal protection component of the Fifth Amendment. Only the NRA advanced this argument in the briefing below.

V. THE "FALLBACK" DEFINITION OF ELECTIONEERING COMMUNICATIONS IS UNCONSTITUTIONAL.

The fallback definition of "electioneering communications" is derived from the Ninth Circuit's decision in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), "a case that has been largely discredited. *See, e.g., Chamber of Commerce v. Moore*, 288 F.2d 187, 194 (5th Cir. 2002) (citing cases disagreeing with *Furgatch*)." Kollar-Kelly, J., Mem. Op. 377. This provision is constitutionally infirm for much the same reasons as the principal definition: it is animated by the same impermissible purpose; there was a less restrictive alternative available to Congress in the form of the Snowe-Jeffords provision; and the measure is overbroad insofar as it applies to expenditures by voluntary membership organizations funded exclusively by individuals. And as rewritten by Judge Leon, the back-up definition has no geographic or temporal limitation and thus is wildly overbroad.

This definition, both before and especially after Judge Leon's "saving" construction, suffers from an additional problem: vagueness. If there was one subject upon which the members of the district court panel agreed, it was the difficulty of ascertaining the meaning of a particular advertisement. Title II's fallback definition requires the NRA and other speakers to endeavor to divine whether the Government, armed with criminal enforcement power, will determine that an ad "promotes or supports" or "attacks or opposes" a candidate. As

Judge Kollar-Kotelly noted, "[t]he *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of a political message." Kollar-Kotelly, J., Mem. Op. 443. And "[t]he expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial." *Id.* at 446-47. The chilling effect of such uncertainty is an independent basis for invalidating this provision.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

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